Supreme Court, U.S.
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NO. 93-49

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BILL ELDRIDGE,
Petitioner,

v.

COBB COUNTY, a political subdivision of the State of Georgia, and ROBERT HIGHTOWER, in his official capacity as Director of Public Safety, Cobb County, Georgia,
Respondents,

and E.A. CAMPUZANO, SCOTT HALTER, and LARRY SOPER,
Additional defendants in the District Court.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari in this case of alleged excessive force in effecting an otherwise lawful arrest to review a decision finding a local government and a policy making official not liable where the evidence showed that proper policies, training and supervision were in place prior to and following an isolated incident of alleged excessive force.

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Respondents in the above-styled action respectfully oppose the Peititon for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit. Respondents show that the Courts below properly applied the precedent of

this Court to determine that there was no liability on Cobb County and Director Hightower. The law was properly applied, and this case offers this Court no opportunity to correct any conflict among the circuits. Accordingly, Respondents respectfully request that the petition be denied.

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the trial court without opinion is noted at Eldridge v. Campuzano, 986 F.2d 507 (11th Cir. 1993). A copy of said decision appears at Appendix, p. 25a.

The decision of the Court of Appeals dening petitioner's motion for rehearing has apparently not yet been noted in a published report. A copy of said denial appears at Appendix, p. 26a.

The Orders of the U.S. District Court, N.D.Ga., granting respondents' motion for summary judgment and entering final judgment pursuant to Fed.R.Civ.P. 54(b) have not been published. Copies of said Order appear at

Appendix, pp. 1a-14a & pp. 15a-23a, respectively.

STATEMENT OF THE CASE

I. Policy and training.

The Code of Conduct of the Cobb County Police Department implements the formal policy of the County. With regard to the matters in issue in this case, the Code of Conduct provides as follows:

1.48 TREATMENT OF PERSON IN CUSTODY

Officers shall not mistreat nor allow any other person to mistreat persons in their personal custody. They shall be handled in accordance with the law and Departmental General Orders.

1.49 USE OF FORCE

Officers shall not use more force in any situation than is reasonable under the circumstances. Force shall be used in accordance with the law and Departmental General Orders.

Director Hightower testified to a nineteen-year history of strict discipline for officers that engaged in misconduct such as that alleged in this case.

> [A]ny time an arrest has been made and the Defendant is in handcuffs, there is no more force. . . . [I]f there has been one consistent result of discipline over the 19 years that I've been here, it is that anybody who is mistreating a prisoner in handcuffs has been summarily terminated.

The clear factual material of record shows that all Cobb County Police Officers receive proper training in the basic police skills necessary to handle their assignments - including responding to "loud party" calls. Director Hightower specifically testified that responding to "loud party" calls "is all a part of the overall training" and that "it does not require a specific seminar entitled how to enforce laws pertaining to teenage drinking parties."

The record shows that prior to the Internal Affairs investigation of the underlying incident, the policy makers were unaware of any prior incidents of misconduct or

"violent propensities." There is no evidence of any such actual or constructive knowledge. Much less is there any evidence that such knowledge was "widespread."

II. The incident of March 11, 1989.

In March of 1989, petitioner's son David Eldridge was a high school junior. On March 11, 1989, David attended a party in unincorporated Cobb County where he and other teenagers were consuming alcoholic beverages. David drove to the party with his friend Jeff Clark and their dates. David had already consumed alcohol prior to arriving at the party, and David continued to drink alcoholic beverages while at the party.

Officer E.A. Campuzano responded as backup to the site of the party in response to a "loud party" complaint. That evening, Officer Campuzano was accompanied by Angie Maddox.[1] Ms. Maddox was the secretary to Judge Carlisle of the Cobb County State Court. Cobb County Police Department General Order 13 III B makes provision for allowing court personnel, reporters and certain other individuals, to

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[1] At that time, Officer Campuzano was dating Ms. Maddox. Subsequent to these events, Campuzano and Maddox married.

accompany officers with the permission of supervisors. This ride was authorized by CCPD policy and by Officer Campanzo's supervisor.

David had been at the party for approximately one hour when someone announced that the police were coming. The result was a "stampede" of the approximately forty party-goers from the house. Officer Campuzano arrived to see, in his own words, "a whole bunch of kids running up and down the street, beer cans laying in the street all over the place." David and his friend Jeff decided to get the jeep that David had driven to the party and circle back to pick up their dates.

Once David and Jeff reached the jeep, Officer Campuzano approached them.[2] Officer Campuzano investigated to see if David and Jeff had been drinking and were about to drive off. Officer Campuzano asked to see identification and proof of motor vehicle insurance. Suspecting that they had been drinking at the party, Officer Campuzano told David and Jeff

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[2] There are some differences in the accounts of the incident given on deposition by Clark and Campuzano. However, these variations are minor and are immaterial for the purpose of determining the liability of the policy making respondents. Additionally, petitioner made no claim below that the initial interaction between David and any Cobb County Police Officer was improper.

that he would have to give them an alco-sensor test.[3]

When Officer Campuzano returned to his patrol car to get the alco-sensor, David sped off. While the parties may differ on some immaterial elements of this initial contact, it is clear that David and his passenger left the scene and that the police pursued them by car. District Court Order at Appendix, pp. 1a-3a. Officer Campuzano used his siren and flashing blue lights to indicate that David should stop.

At this point, in the words of David's companion Jeff, David had "panicked" and was "out of control." Instead of circling back for their dates as planned; David sped out of the residential subdivision where the party had been, and stranded both his and Jeff's date at the site of the party. After speeding out of the residential area were the party had been, David turned into another residential subdivision. In an effort to escape from the police, David turned his automobile's lights off. David continued to speed, even though according to his passenger, David could not see. On deposition, David's passenger Jeff testified that David's driving scared him so

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[3] An "alco-sensor" is a hand-held electronic device which is used to determine if the tested individual has consumed alcohol recently.

badly that he considered jumping from the moving vehicle. Jeff stated that all during this time, he was shouting at David to pull over and that David ignored this reasonable request.

David never voluntarily brought the vehicle to a stop. In the words of his frightened passenger, as David sped through a residential subdivision (turning his lights off intermittently), David came "up to a four way stop and a car -- I think a car was pulling out, and David swerved to miss or he tried to take a right there; and the car skidded into the side of the curb." As a result, both tires on the driver's side of the vehicle blew out and the jeep turned over on its side.

Even then, David did not stop. David began to flee on foot. David and Jeff ran behind nearby houses and into a wooded area. Officer Campuzano pursued David on foot. When Officer Campuzano finally caught up with David and attempted to place him under arrest, a lengthy struggle began between the two.

In time, Officer Halter and Soper located David and Officer Campuzano in the woods and arrived on the scene. Both Halter and Soper were extremely worried and in a very excited state due to having lost contact with Officer Campuzano during Campuzano's foot pursuit and hand-to-hand struggle with David Eldridge.

Although there is some degree of disagreement as to exactly what happened at the scene of the struggle; the evidence indicates that David was struck in violation of Cobb County policy.

It is clear from the deposition testimony of the individual officer-defendants that any abuse was not pursuant to policy or training. This fact clearly appears from the deposition testimony of Soper:

> Q: What had you been trained to do to subdue a situation like that where you've got a police officer and a suspect yelling at each other? What has your training taught you that you were supposed to do?
>
> A: Well, my training went out the window that night.
>
> Q: . . . [W]hat are you supposed to do in that kind of situation?
>
> A: You're supposed to hold your cool and take the guy into custody.

(emphasis added). By his response, Soper clearly shows that proper policy and training was in place, and that the instant incident arose not because of improper policy or training, but because of the excitement of the moment. Soper explained that "I [Soper] was mad that Eddie [Officer Campuzano] was laying

there hurt. He had been lost for 15 minutes." Officers Halter and Campuzano offered similar explanations for their conduct. The incident, and especially the possibility that Officer Campuzano had been seriously hurt, caused the emotions of the officers to run high. In fact, months later, the deposition of Office Halter had to be briefly recessed because of the continuing emotional effect on Officer Halter.

Petitioner's contention that "the entire chain of command of the precinct had covered up the incident" is entirely false and is supported by no evidence. Petition for Writ of Certiorari, p. 6 [hereinafter "Petition"]. The individual officers who had violated their training and Cobb County policy, intentionally concealed the incident from the chain of command. See Petition, p. 6 ("Soper did not write a report that he had struck David."). The record cite provided by petitioner to support this claim is the deposition of defendant Soper, where he testified that he told his superiors that "I [Soper] don't really know what happened out there yet . . . I really don't know anything." There is absolutely no evidence of a supervisory cover up. The evidence shows that the officers involved knew that they had violated policy, and that they concealed the fact in an unsuccessful effort to avoid the consequenced that they knew would

surely follow. When petitioner's complaint came to the attention of Director Hightower, an investigation was commenced immediately.

III. Cobb County and Director Hightower's response to the incident.

Upon receiving a complaint, Cobb County conducted a thorough Internal Affairs investigation which unearthed previously unknown information regarding the officers. The Internal Affairs investigation uncovered two prior incidents in which two of the officers had drawn their weapons without completing proper documentation. These incidents (which occurred in the few weeks preceding the March 1989 incident) were not known prior to this investigation. As a result of the investigation, Campuzano, Halter and Soper were determined to have violated Cobb County policy and each was terminated.

There is no evidence to support petitioner's contention that any of the involved officer's had "violent propensities" which were previously known to the chain of command. Petition for Writ of Certiorari, p. 7. Petitioner's supporting citation for this proposition is to Maj. Moody's deposition, Ex. p. 73. This Exhibit is a statement given by Soper to Internal Affairs. Soper's statement

shows clearly that these allegations were not known to their precinct superiors, much less to Director Hightower.

While there may be some question as to the exact actions of the individual officer-defendants, it is clear that any excessive force applied to effect the arrest of David Eldridge was not pursuant to governmental policy. It is especially clear that any maltreatment of David after his arrest was directly contrary to governmental policy.

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the petition for a writ of certiorari. U.S.Sup.Ct.R. 10. Both Courts below faithfully applied this Court's controlling precedent by summarily holding that the County and Director Hightower were not liable. City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); Monell v. New York Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). There is no conflict between the circuits that can be resolved on the facts of this case. Petitioner has not pointed out to the Court any genuine conflict between the circuits. Indeed, there is no error of any kind.

ARGUMENT

I. Petitioner's "failure to supervise" theory does not merit review by this Court.

A. Petitioner's contentions - generally.

Petitioner mischaracterizes the District Court's ruling as adopting what petitioner terms a "'subsequent investigation' standard." Petition, p. 9. Petitioner then argues that there is a conflict between the circuits based upon his intentional miscontruction of the decisions below, as well as the precdent of other circuits. Apparently, petitioner interprets the holding below as being that

> With regard to Plaintiff's claim that the Defendants failed to supervise and investigate former acts of violence, the Court below . . . applied a subsequent investigation standard, stating that since the government did investigate and take action against the officers, after the incident occurred, then there was no showing of a policy or custom of

ignoring imporper police behavior or failing to supervise officers.

Petition, p. 9.

Petitioner apparently wants this Court to review this case to determine whether a subsequent investigation alone will sufficiently show a governmental policy. This issue is not presented to the Court on the facts of this case because of the abundance of uncontradicted evidence that proper policy, supervision and training were in place prior to the March 1989 incident. Director Hightower testified to a nineteen year history of proper training and strict discipline. The "subsequent investigation" conducted by the Cobb County Police Department was a natural continuation of this history of implementing constitutionally correct policies. Notwithstanding the unrebutted evidence refuting liability, petitioner urges that the Courts below erred in its analysis of petitioner's "pre-incident," "post-incident," and "group action" theories. Petition, p. 9.

B. No "pre-incident" evidence supports petitioner's claim.

Respondents agree with petitioner that supervisory liability may attach in some circumstances were policy makers know of

misconduct and take no corrective action. Petition, p. 10. However, the record in this case is totally devoid of any evidence to support such liability. When the evidence of misconduct became known, corrective action was swift and certain. The alleged "prior incidents" and "violent propensities" upon which petitioner seeks to base his claim were not known to the policy makers and were only uncovered in the course of defendants' Internal Affairs investigation. As soon as these matters came to light, the individual officers involved were terminated.

The cases cited by petitioner are consistent with the holding below and thus show no split of authority exists. Petitioner's citation of the District Court Order in Brandon v. Allen, 516 F.Supp. 1355 (W.D.Tenn. 1983), rev'd, 719 F.2d 151 (6th Cir. 1983), rev'd & remanded sub nom Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), supports the holding of the Court's below. Liability in Brandon attached to a police chief because he "should have known" of the reputation of one of his officers for violence. In sharp contrast to the facts of Brandon, in this case, there is no evidence that any of the officers involved were "mental cases" who relished violent acts. Nor is there any evidence that Cobb County or Hightower knew or should have known of any

pattern of violence. There is no evidence that the officers in the instant cases had a widespread reputation for violence. There is simply no evidence to support a holding based upon Brandon.

C. No immediate "post-incident" evidence supports petitioner's claim.

Petitioner contends that there is a split of authority inasmuch as the Courts below "failed to analyze the non-action of the county immediately following the incident[.]" Petition, p. 12.[4] The facts remain that as soon as Director Hightower was informed of the incident that an investigation was begun. The facts are clear that the chain of command had no knowledge of the alleged constitutional violation. The County and Director Hightower

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[4] It appears that petitioner's real arguement is that the County and Director Hightower are liabile pursuant to "respondeat superior" for the acts of the officer's involved in the incident. See, City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). In support of this "non-action" argument, petitioner merely cites to various facts about the actions taken by the patrol officers. Petition never once directs this Court to any fact which pertains to the policy making officials of Cobb County.

cannot be held liable solely because rogue officers fail to report their own misconduct. In fact, the officers' concealment shows that they clearly understood that they had violated County policy.

Petitioner's authority of Grandstaff v. City of Borger, Tex., 767 F.2d 161 (5th Cir. 1985), cert. denied, 480 U.S. 916 (1987), provides that:

> Where police officers know at the time they act that their [misconduct] will meet with the approval of city policy makers, the affirmative link/moving force requirement is satisfied

767 F.2d at 170. In the instant case, it is clear that the officers knew that their conduct would not meet with approval. In fact, the officers concealed their acts because they knew that County policy demanded that they pay the consequences for their actions.

Petitioner's authority of Grandstaff is also factually dissimilar to the instant case. In the Grandstaff case, there were "no reprimands, no discharges and no admission of error." Id. at 171. This contrasts starkly with the evidence in the instant case.

D. No "group action" evidence supports petitioner's claim.

In support of his agrument that "[t]he Court below . . . ignored the fact that a group of officers inflicted policy brutality against David[,]" petitioner cites Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989). Contrary to petitioner's bare assertion, the holding of Bordanaro is completely consistent with the holding below. The full quote from which petitioner offers a selective sample is as follows:

> While is is true that evidence of a single event alone cannot establish a municipal custom or policy, [cit.], where other evidence of the policy has been presented and the "single incident" in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom.

Id. at 1156-57 (emphasis added, footnote omitted). Petitioner offered the Courts below exactly what the Bordanaro court indicated would not support liability: a single incident

with no "other evidence of the [improper] policy." Id.

Additionally, the facts of Bordanaro are significantly different from the instant case. In contrast to the instant case, Bordanaro: 1) involved the entire night watch of an entire police department, id. at 1153; 2) involved planned and premeditated acts of violence, id. at 1153-54; 3) involved a twenty-four year history of implementing a facially unconstitutional arrest and excessive force policy, id. at 1156; 4) substantial evidence of woefully inadequate training, id. at 1158-61, and 5) improper post-event investigation, id. at 1166-67. The holdings below are consistent with the holding of Bordanaro. Essentially, petitioner offers this Court a single incident of excessive force. The single incident upon which petitioner bases his case is simply insufficient under Oklahoma City v. Tuttle, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985).

II. Petitioner's "failure to establish policy" theory does not merit review by this Court.

Petitioner contends that constitutional violations occurred as a direct result of the absence of two specific affirmative policies.

Petitioner contends that a constitutional violation occurred because Cobb County had no specific policy "forbid[ding] relatives or girlfriends or boyfriends from riding with a policy officer[.]" Petition, p. 15. Petitioner also contends that a violation occurred because Cobb County had no specific policy "regarding how to handle transportation of a subject after the use of force." Petition, p. 16.

The only material which Petitioner relied in support of these claims was the affidavit of Louis J. Reiter, a purported police expert. This expert never states that Director Hightower or Cobb County violated any constitutional right of any party.[5] Instead of addressing the relevant issues of constitutional rights; the Reiter affidavit repeatedly identifies what Mr. Reiter considers "gross deviations from ordinary police practice."

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[5] Even if the expert did opine that certain acts were constitutional violations, that would still not defeat summary judgment. See, Marx v. Gumbinner, 905 F.2d 1503, 1507 fn. 6 (11th Cir. 1990). Respondents submit that the Courts must determine whether constitutional violations occurred from the facts of record.

No factual evidence was presented to show that the policies or lack thereof implicated any constitutional right. The facts clearly show that the mistreatment which petitioner alleges did not flow from any existing or absent policy of Cobb County or Director Hightower. In ruling on petitioner's claims, the District Court properly held that:

> There is no evidence of the necessary causal link between the lack of a policy or custom and the alleged constitutional violations in this case.

District Court Order at Appendix, p. 8a.

Surely, petitioner does not seriously contend that the framers of the Constitution intended the fourth amendment to mean that relatives cannot ride in a patrol car with an officer. There must be a proximate-causal relationship between the policy and the injury. This causal connection is missing in this case. Petitioner's lack of policy argument stretches concepts of causation beyond the limits of reason. It is simply <u>not</u> foreseeable that allowing relatives to ride in a patrol car or allowing an officer on the scene to use his discretion in arranging transportation will cause the use excessive force. Petitioner's injuries are simply too far removed from the

policy. Cf. Palsgraf v. Long I. R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

All of petitioner's "lack of affirmative policy" arguments share the same defects. In each case, the argument is unsupported by law and by fact. Even assuming factual support for the allegations, in each case, petitioner's argument falls prey to the remoteness and speculative nature of the alleged causal relationship. This aspect of plaintiff's claim was properly decided below under this Court's clear holding in Canton v. Harris.

III. Petitioner's "inadequate training" theory does not merit review by this Court.

With regard to petitioner's "failure to train" claim, the District Court properly held as follows:

> Plaintiff has not demonstrated to this court a deliberate indifference to the needs of the citizens by merely alleging that special police training is necessary[.]

District Court Order at Appendix, p. 8a. Petitioner continues to claim that a purported lack of training brings this case within the ruling of City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989),

which held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 109 S.Ct. at 1204 (emphasis added). In the instant case, there is no evidence to support a finding of "deliberate indifference" to citizen's rights on the part of Cobb County or Director Hightower. In fact, the County and the Director have made an affirmative showing that proper training was in place.

Petitioner's training allegations center on the issue of training for responding to "teenage drinking parties." Petitioner offers his sole support for this argument in the form of an opinion affidavit from Mr. Rieter, a purported police expert. Essentially, petitioner's retained affiant merely opines that there was a "gross deviation from standard police practice generally." This affidavit is insufficient to support petitioner's claim for a number of reasons.

First, Mr. Rieter does not state the facts necessary to allow the Court to draw its own conclusions regarding the constitutionality of the training situation. See, supra, fn. 5 (impact of opinion evidence on Court's

determination). Rieter must rely upon the facts appearing of record to support his conclusions; however, Rieter identifies no such facts. Rieter's affidavit does not speak to the issue at hand (i.e., constitutional wrong), but instead, merely states his own opinions of desirable training without a factual basis for him to opine that training was insufficient.

Second, the clear factual material of record shows that the officers received the proper training in the basic police skills necessary to handle their assignments - including responding to "loud party" calls. Rieter provides no factual basis for his assertion that special training was necessary, nor does Rieter provide any detail as to why the present training was insufficient or what his proposed circiculum would include. In contrast, Director Hightower on deposition testified that responding to "loud party" calls "is all a part of the overall training." "[I]t does not require a specific seminar entitled how to enforce laws pertaining to teenage drinking parties."

Third, training with regard to "loud party" calls is unrelated to the injury claimed which resulted from a struggle that took place after a car chase and a foot chase which ended in another neighborhood. See, supra, pp. 5-9. The injuries complained of did not occur at the

site of a "teenage drinking party," nor did they result directly from police response to such a party. Officer Campuzano's response to a "loud party" call was his first interaction with David Eldridge; however, there was no injury as a result of this interaction. By the time any injury was inflicted, this matter had ceased to be a "loud party" call and had become first a car chase and then a foot chase to arrest a suspect. Accordingly, Rieter's Affidavit opinion that there was insufficient "party" training is not only lacking in factual basis, it is also clearly factually immaterial.

CONCLUSION

Wherefore for all the above stated reasons, the respondents respectfully request that the Petition for Writ of Certiorari be denied. Review on writ of certirorari is a matter of discretion and should only be granted when supported by special and important reasons. U.S. Sup. Ct. Rule 10; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73 (1955).

In this case, the petitioner is not seeking a writ of certiorari to settle important legal issues or to harmonize the laws

of the several circuits. Rather, the petitioner merely wants this Court to review the evidence (which petitioner has badly misconstrued) to determine compliance with existing precedent. This is not an issue of great public importance which merits review by this Court.

Accordingly, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

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